No. 75-1711

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1976

ELI DANIELS AND HARRY DANIELS, D/B/A THE HEART OF THE BLACK HILLS STATIONS, PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The court of appeals rendered no opinion. The decision of the Chief of the Broadcast Bureau of the Federal Communications Commission (Pet. App. 3a-4a) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a) was entered January 22, 1976. A timely petition for rehearing was denied on February 27, 1976 (Pet. App. 2a). The petition for a writ of certiorari was filed on May 25, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a court of appeals has jurisdiction to review action taken by the staff of the Federal Communications Commission pursuant to delegated authority, where that action is subject to review by the Commission before becoming final.

STATUTE INVOLVED

Section 5(d) of the Communications Act of 1934, as amended, 75 Stat. 420, 47 U.S.C. 155(d), provides in relevant part:

> (1) When necessary to the proper functioning of the Commission and the prompt and orderly conduct of its business, the Commission may, by published rule or by order, delegate any of its functions (except functions granted to the Commission by this paragraph and by paragraphs (4), (5), and (6) of this subsection) to a panel of commissioners, an individual commissioner, an employee board, or an individual employee, including functions with respect to hearing, determining, ordering, certifying, reporting, or otherwise acting as to any work, business, or matter; except that in delegating review functions to employees in cases of adjudication (as defined in the Administrative Procedure Act), the delegation in any such case may be made only to an employee board consisting of three or more employees referred to in paragraph (8). Any such rule or order may be adopted, amended, or rescinded only by a vote of a majority of the members of the Commission then holding office. Nothing in this paragraph shall authorize the Commission to provide for the conduct, by any person or persons other than persons referred to in clauses (2) and (3) of section 7(a) of the Administrative Procedure Act, of any hearing to which such section 7(a) applies.

* * * * *

> (7) The filing of an application for review under this subsection shall be a condition precedent to judicial review of any order, decision, report, or action made or taken pursuant to a delegation under paragraph (1). The time within which a petition for review must be filed in a proceeding to which section 402(a) applies, or within which an appeal must be taken under section 402(b), shall be computed from the date upon which public notice is given of orders disposing of all applications for review filed in any case.

* * * * *

STATEMENT

From 1957 until 1973 petitioners held licenses to operate two television stations in South Dakota. In October 1968 the Commission initiated proceedings upon the renewal applications of both stations in order to determine, *inter alia*, whether the stations' management and operation "was so negligent, careless, or inept, or evidence[d] such disregard for the Commission's Rules and Regulations, that [petitioners] cannot be relied upon to fulfill the responsibilities imposed upon them" (FCC 68-1032 (October 21, 1968)). Following a full evidentiary hearing the Commission denied renewal of the licenses of both stations. 32 F.C.C. 2d 196, rehearing denied, 36 F.C.C. 2d 568. The decision was upheld by the Court of Appeals for the District of Columbia Circuit. *Heart of the Black Hills Stations* v. *Federal Communications Commission*, C.A.D.C., No. 72-1804, decided February 26, 1973. This Court denied certiorari on November 5, 1973. 414 U.S. 1002.

Although the Commission's orders required the stations to cease operations within 30 days after final disposition

of any judicial review, on June 5, 1973, the Commission granted petitioners temporary authority to continue operation of the stations until either an interim operator or a new licensee had been selected. 41 F.C.C. 2d 170.

In January 1968 petitioners had filed an application to construct a new antenna system. Such an application is a "major change" application, 47 C.F.R. 73.639, and decisions concerning "major change" applications are deferred pending the outcome of renewal hearings. 36 F.C.C. 2d 568, 573 n. 19. The Commission accordingly deferred action on the antenna construction application until the completion of the renewal proceedings. After the Commission decided not to renew petitioners' licenses the Commission's staff, pursuant to delegated authority (see 47 U.S.C. 155(d)(1)), dismissed the antenna construction application (Pet. App. 3a-4a).

Petitioners did not ask the Commission to review this staff decision. Instead, they sought review in the Court of Appeals for the Eighth Circuit. That court concluded that the Court of Appeals for the District of Columbia Circuit has exclusive jurisdiction to review Commission actions with respect to antenna construction permits and accordingly dismissed the proceeding (Pet. 11). Petitioners then sought review in the Court of Appeals for the District of Columbia Circuit, which dismissed the proceeding "for lack of jurisdiction due to petitioners' failure to exhaust their administrative remedies before the Commission" (Pet. App. 1a).

ARGUMENT

The decision of the court of appeals is correct. This case does not present any question of general importance requiring review by this Court.

The Commission's staff decided that petitioners' application to construct a new antenna was moot because

petitioners no longer were licenses of the stations. The staff acted for the Commission, pursuant to delegated authority. 47 U.S.C. 155(d)(1); 47 C.F.R. 0.71, 0.201 and 0.281. The Commission's rules contain explicit regulations governing the procedures for seeking Commission review of staff actions taken pursuant to delegated authority. 47 C.F.R. 1.101, 1.102, 1.104 and 1.115. Petitioners have never filed an application for review by the Commission of its staff's action. Accordingly, judicial review is barred by 47 U.S.C. 155(d)(7), which provides that an application for review of a staff action taken pursuant to delegated authority "shall be a condition precedent to judicial review". See also *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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